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In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES HAROLD ISENRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1969. A petition for rehearing was denied on January 6, 1970. The petition for a writ of certiorari was filed on February 19, 1970.[1]

[1] The petition itself was delivered to the Clerk of this Court on February 5, 1970, within the period fixed by Rule 22–2 of the Rules of the Court, but no certified record was filed at that time. In a letter dated February 17, 1970, counsel for petitioner stated that on January 23, 1970, an order was obtained directing the Clerk of the Seventh Circuit to transmit the record to this Court, but that the Clerk inadvertently failed to do so. Since the matter is essentially one of docketing, the government raises no issue as to timeliness. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84–86. Compare Brief for the United States in *Schacht* v. *United States*, No. 628, this Term, at pp. 9–21.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order to petitioner to report for civilian work in lieu of induction contravened the Thirteenth Amendment.

2. Whether the order to report for civilian work, signed by the clerk of the local Selective Service board, complied with the requirements for an authorized order as set out in 32 C.F.R. 1660.20(d).

3. Whether the local board erred in failing to reopen the petitioner's I–O classification where the alleged new information relating to his claim of a ministerial exemption had already been considered by the board.

REGULATIONS INVOLVED

32 C.F.R. 1660.20 provides, in pertinent part:

* * * * *

> (c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. * * *
>
> (d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction,

> the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

32 C.F.R. 1625.2 provides, in pertinent part:

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant * * *, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * *.

32 C.F.R. 1625.4 provides:

> When a registrant * * * files with the local board a written request to reopen and consider anew the registrant's classification, and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification * * *.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of wilfully and knowingly failing to report for civilian work in lieu of induction as

ordered, in violation of 50 U.S.C. App. 462. On March 6, 1969, he was sentenced to probation and ordered to report to Madison General Hospital for two years of civilian work. The court of appeals affirmed (Pet. App. 1–9).

The evidence showed that in June 1965 petitioner filed a Classification Questionnaire with his local board stating that he was working as a carpenter apprentice for forty hours a week; that he was a minister in the Watchtower Bible and Tract Society of Jehovah's Witnesses; and that he was a conscientious objector (Exh. 4).[2] In July 1965, petitioner executed a Form 150, requestiong his local board to classify him as a conscientious objector (Exhs. 51, 52).

After being classified I–A in December 1965, petitioner was given a physical examination and found to be fit for military service (Exhs. 47, 57). In February 1966 petitioner submitted a Current Information Questionnaire (Exh. 44) and requested a personal interview, enclosing affidavits from two ministers to reinforce his claim that he was a minister in Jehovah's Witnesses (Exh. 46). At his personal appearance before the local board on June 13, 1966, petitioner reiterated his claim to a ministerial exemption. He indicated he was an assistant presiding minister of the Brookfield congregation and a book study conductor. He also disclosed that he devoted about 13 hours a week to ministerial duties and worked 40 hours a week as a carpenter. The local board again classified petitioner as I–A (Exh. 38). On appeal, the ministerial

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[2] "Exh." refers to exhibits filed by the government in district court.

claim was not sustained, but petitioner's classification was changed to I–O (conscientious objector), in August 1966 (Exhs. 37, 16).

After being classified I–O by the State Appeal Board, petitioner, on September 19, 1966, wrote a letter to the local board reasserting his claim that he was a minister. To this he attached a letter of the Watchtower Society, dated June 22, 1966, which certified that his position was assistant presiding minister of the Brookfield congregation. He stated: "I hereby make an appeal to the Appeal Board that my file be examined anew, so that I will be considered as a minister of Jehovah God" (Exhs. 17, 18). The local board acknowledged receipt of these documents on October 5, 1966 (Exh. 19).

On December 12, 1966, petitioner was asked to designate which of three types of civilian work he would choose, but he declined to do so (Exhs. 25, 26). On February 13, 1967, petitioner met with the local board to discuss civilian work alternatives available to him. The report of the board states (Exh. 33):

> No agreement was reached between the registrant and the local board as to a type of civilian work that this registrant would perform in lieu of induction.
>
> The local board determined that hospital work at Madison General Hospital was appropriate and available, and that the Director of Selective Service be requested to authorize the issuance of an order to the registrant to perform such work.

On April 25, 1967, the local board received authorization from the National Director of Selective

Service to issue an order requiring petitioner to perform the type of civilian work it deemed appropriate (Exh. 36). A letter dated May 2, 1967, signed by the clerk of the local board, ordered petitioner to report for civilian work at the Madison General Hospital on May 17, 1967 (Exh. 13). Petitioner failed to report as directed (Exhs. 7, 8, 9, 10).

ARGUMENT

1. It has been consistently held that an order to report for civilian work in lieu of induction does not contravene the Thirteenth Amendment. Under the congressional power to conscript it may determine that, as to conscientious objectors, civilian work is an acceptable alternative to compulsory military service. *E.g., United States* v. *Higgins*, 416 F. 2d 406 (C.A. 2); *United States* v. *Chandler*, 403 F. 2d 531 (C.A. 4); *United States* v. *Holmes*, 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936.

2. Petitioner argues that the local board did not issue an order to report for civilian work, as required by 32 C.F.R. 1660.20(d), since there was no showing that, after it received authorization from the National Director, it directed the clerk to issue the order to report for civilian work. It is clear, however, that after meeting with petitioner the board deliberated and directed the assignment of petitioner to civilian work at the Madison General Hospital, as long as subsequent authorization by the National Director was obtained. It was not necessary for the board to meet again to reaffirm this order; the action of the clerk of the board in signing and mailing a notice thereof to petitioner was no more than a min-

isterial implementation of the earlier order. All the circuits which have considered the issue have now so held. *United States* v. *Stark*, 418 F. 2d 901 (C.A. 9), certiorari denied, March 2, 1970, No. 1488 Misc., this Term; *United States* v. *Hilgeneck*, 418 F. 2d 233 (C.A. 6), certiorari denied, February 24, 1970, No. 923, this Term; *United States* v. *Powers*, 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923; *United States* v. *Crowley*, 405 F. 2d 400, 403 (C.A. 4), certiorari denied, 394 U.S. 904. See also Pet. App. 3–6.

3. Petitioner argues that his letter of September 19, 1966, was a request for reopening of his classification; that the record fails to show that the board considered the request and that he was never notified of any action thereon by the board. We do not believe the letter of September 19 was a request for reopening; it was in terms a request for reconsideration by the appeal board. The only "information" offered was a letter of June 22, 1966, a date prior to when the appeal board had acted on petitioner's appeal in August 1966.

In any event, petitioner clearly presented no basis for reopening his classification. The local board already knew that petitioner claimed a ministerial exemption as assistant presiding minister and book study conductor of the Brookfield, Wisconsin, congregation; his September letter contained no new information in this regard. If there was any defect in the procedure followed, petitioner's rights were in no respect affected thereby. Even if the board should have notified petitioner that his claim was not deemed

to present new information, petitioner was surely made aware of that fact on December 12, 1966, when he was requested to designate one of the three types of civilian work offered in lieu of induction. Indeed, at the meeting in February 1967 to discuss civilian work alternatives, petitioner "agreed that his file was complete and understood by him" (Exh. 33).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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